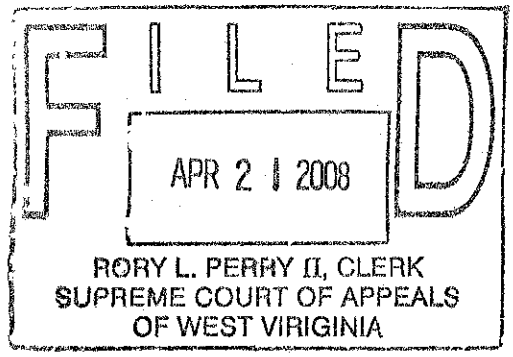
NO. 33650

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

at Charleston



STATE OF WEST VIRGINIA,

Appellee,

vs.

ROBERT LEE SHINGLETON,

Appellant.

BRIEF OF APPELLEE

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

The defendant, Robert Lee Shingleton, was indicted by the Grand Jury of Kanawha County for the felony offenses of First Degree Robbery as contained in Count One of the indictment, in violation of W. Va. Code §61-2-12, and Malicious Assault as contained in Count Two of the indictment, in violation of W. Va. Code §61-2-9, on November 17, 2004. The case was docketed for trial under Case No. 04-F-397 in the Circuit Court of Kanawha County, West Virginia, and assigned to the Honorable Charles E. King, Jr.

The defendant's case was called for trial on both counts on June 21, 2005. The defendant was acquitted of the felony offense of First Degree Robbery contained in Count One of the indictment. The defendant was convicted for the felony offense of Malicious Assault contained in Count Two of the indictment on June 23, 2005.

The State of West Virginia filed a repeated and habitual offender information pursuant to W. Va. Code §§61-11-18, 19, charging the defendant as a one-time previously convicted felon on June 24, 2005. The Court arraigned the defendant on the said information on December 6, 2005. The defendant admitted that he was the same person previously convicted of a felony.

The Court heard the defendant's motions for new trial and judgment of acquittal and denied these motions. The defendant was

sentenced to an indeterminate term of not less than four years nor more than ten years in the custody of the Commissioner of Corrections on February 15, 2006. The defendant was subsequently resentenced to the same sentence to permit this appeal on October 24, 2006.

IV.

STATEMENT OF FACTS

On August 31, 2004, Edward Stanley Ayers, the victim, went out to cash a paycheck at the City National Bank branch on Kanawha Boulevard, West, in Charleston, West Virginia. The paycheck was in the amount of One Hundred Fifty Dollars ($150.00). Mr. Ayers left the bank and went to pay some bills. Ultimately, Mr. Ayers arrived at the Tidewater restaurant in the Charleston Town Center Mall at between 1:30 and 2:00 pm. (Day One Transcript at pp. 96, 98). The defendant, Robert Lee Shingleton, was waiting outside the Tidewater restaurant for his brother, an employee of the restaurant. Mr. Ayers asked the defendant to join him for some drinks in the restaurant. The defendant agreed and entered the restaurant with Mr. Ayers.

Mr. Ayers testified that he drank three or four alcoholic drinks and the defendant had two shots of tequila at the Tidewater restaurant. (Day One Tr. at pp. 97-98). Mr. Ayers stated that he was going to the Broadway, a bar on Leon Sullivan Way in Charleston. The defendant joined Mr. Ayers and they walked to the

Broadway together. (Day One Tr. at pp. 98-99). Mr. Ayers stated that he had a few drinks there and decided to return to his apartment located at 512 ½ Kanawha Boulevard, West, Charleston, Kanawha County, West Virginia. (Day One Tr. at pp.99-100). A bartender at the Broadway called a cab to take Mr. Ayers home. Mr Ayers and the defendant had been at the Broadway for an hour to an hour and a half at that time. (Id.).

A C&H taxicab driven by Chris Neeley arrived at the Broadway and drove Mr. Ayers and the defendant to Mr. Ayers apartment. (Day Two Tr. at p. 13). The trip took five to ten minutes. The taxicab driver, Chris Neeley, noted that the person who got into the back seat appeared to be pretty intoxicated. (Day Two Tr. at p. 14). The person who rode in the front seat, who matched the defendant's description, appeared a lot less intoxicated. (Id.). During the trip, the taxicab driver, Mr. Neeley, stated that the defendant was aware that Mr. Ayers had just been paid that day and that the defendant stated,

> "Well, if this queer wants to spend his paycheck on me, then I'll let him."

(Day Two Tr. at p. 16). When the taxicab stopped at Mr. Ayers' apartment on Kanawha Boulevard, West, the defendant got out of the cab and told Mr. Ayers to pay the cabbie. (Id.). Mr. Ayers paid the taxicab driver. (Day One Tr. at p. 100-101). Mr. Ayers struggled to get out of the cab because of his level of intoxication. ((Day Two Tr. at p. 17). The taxicab driver left

but returned later at the request of the Charleston Police Department. (Day Two Tr. at p.15).

After leaving the cab, Mr. Ayers and the defendant proceeded into Mr. Ayers apartment. (Day One Tr. at pp. 100-101). Mr. Ayers went into the livingroom of the apartment and turned on the television. Mr. Ayers then went to the kitchen to fix a few drinks for himself and the defendant. (Day One Tr. at pp. 101-102). Mr. Ayers then sat on the couch (in the middle) with the defendant sitting to Mr. Ayers' right. Mr. Ayers and the defendant talked for a some time. (Day One Tr. at p. 102).

At some point during the conversation, Mr. Ayers placed his right hand on the defendant's leg. (Day One Tr. at p. 103). According to Mr. Ayers' testimony, at this point,

> "[The defendant] seemed to get upset, so that's when I started getting nervous and so I was willing to, you know, you know, give him some money so he could maybe just leave and, you know, like I said, if he needed it for transportation or whatever, he could use it."

(Id.). Mr. Ayers offered the defendant Twenty Dollars ($20.00) to leave. The defendant responded that was not enough [money]. Mr. Ayers then stated that he got hit in the left side of his face and lost consciousness. Day One Tr. at p. 103-104).

When Mr. Ayers finally regained consciousness, he was bleeding badly and attempted to stop the bleeding. (Day One Tr. at p. 104). Mr. Ayers called a friend, Rocky Nutter. Mr. Ayers noted that his wallet was missing with a MasterCard, Sears credit card and

employee discount card, his driver's license, and Thirty-Five Dollars ($35.00) to Forty Dollars ($40.00) in cash. (Day One Tr. at p. 106).

Charleston police were called to the scene at 8:43 pm on August 31, 2004. (Day One Tr. at p. 83). The responding officers noticed blood throughout the house and bleeding from Mr. Ayers' head. (Id.). The defendant was not there at the scene and police received a description of the defendant from the taxicab driver, Chris Neeley.

Mr. Ayers suffered fractures to the left side of his face. Day One Tr. at p. 106). Mr. Ayers was taken to the Charleston Area Medical Center, General Division, by ambulance and was admitted with fractures of his left orbital bones, left maxillary, and left zygoma caused by blunt force trauma. (Day Two Tr. at p. 46-48). According to the treating surgeon, Mr. Ayers was struck "more than once." (Day Two Tr. at p. 48). Mr. Ayers was admitted to the hospital intensive care unit and spent five days in the hospital. Mr. Ayers injuries caused airway problems and required that he be intubated and receive treatment for acidosis as a result of these airway problems. (Day Two Tr. at pp. 47-50). The total blood loss suffered by Mr. Ayers as a result of the defendant's attack was one to two liters, or twenty percent (20%) to forty percent (40%) of Mr. Ayers' total blood volume. Day Two Tr. at p. 51.

The defendant proceeded to trial. The State of West Virginia conducted a "voluntariness" hearing on the defendant's statement to police. However, the statement was not sought to be admitted by the State. The defendant did not testify at the trial.

The defendant wanted the jury to be charged on the affirmative defense of self-defense. However, the trial Court noted that the defense of self-defense has a objective and subjective component. (Day Two Tr. at p.73). The defendant maintained that the touching of the leg by Mr. Ayers was a prelude to a sexual assault and that the defendant was therefore justified in attacking Mr. Ayers.

The Court concluded that the defendant did not present sufficient evidence to permit a self-defense instruction to be offered. The Court stated that, "There is no evidence that [the defendant] did anything based on self-defense." (Day Two Tr. at p. 73). The Court further stated that,

> "Your client was a lot, lot less intoxicated than the victim. So just looking at those pieces of testimony and a drunk, person intoxicated, touching another person's leg as amounting to some kind of endangering assault? I don't think so."

(Day Two Tr. at p.76). Therefore, the Court denied the defendant's request for an instruction on self-defense but permitted the defendant to argue the point to the jury.

The defendant was subsequently convicted on the felony offense of Malicious Assault as charged in Count Two of the indictment.

The defendant was acquitted of the charge of Aggravated Robbery as charged in Count One of the indictment.

V.

ISSUE PRESENTED

WHETHER THE CIRCUIT COURT OF KANAWHA COUNTY COMMITTED ERROR BY FAILING TO GIVE A SELF-DEFENSE INSTRUCTION AS REQUESTED BY THE DEFENDANT.

VI.

ARGUMENT

THERE IS NO EVIDENCE THAT THE DEFENDANT WAS IN FEAR OF SEXUAL ASSAULT AT THE HANDS OF EDWARD STANLEY AYERS WARRANTING A SELF-DEFENSE INSTRUCTION.

A trial judge performs a "gatekeeper" function in determining what instructions are to be given to a jury. The instructions are determined by facts of the case presented to the jury and generally the existing law at the time of the trial.

This Court has stated that, as a general rule, the refusal to give a requested instruction is reviewed for an abuse of discretion. The question regarding whether a jury was properly instructed is a question of law and the review is de novo. Syllabus Point #1, State v. Hinkle, 200 W. Va. 280 (1986). Thus, the State's belief is that the standard of review here is based upon an abuse of discretion analysis.

In all circumstances, though, whether considred under an abuse of discretion analysis or a de novo review, instructions must be

supported by evidence. An instruction should not be given where the instruction is not supported by the evidence. Syllabus Point #4, State v. Collins, 154 W. Va. 771 (1971).

In this case, the defendant argued that he was entitled to an instruction on self-defense. The defense of self-defense has two components: a subjective component and an objective component. The subjective component requires the defendant to show that his conduct was in his own mind reasonable under the circumstances. The objective component requires an appraisal under an objective "reasonable person" standard that the use of force in defense was objectively was necessary and that the amount of force used was, under the circumstances, objectively necessary. See, State v. Kirtley, 162 W. Va. 248, 263 n. 8 (1979)

In such cases, the burden of showing the imminency of danger lies with the defendant. No prior apprehension of danger will justify an affirmative defense of self-defense. See, Syllabus Point #6, State v. McMillion, 104 W. Va. 1 (1927), and Syllabus Point #7, State v. Whitaker, 211 W. Va. 117 (2002). Put another way, if there is no evidence of a threat, a self-defense instruction will not be given. Cf., State v. Asbury, 187 W. Va. 87, 89-90 (1992).

The burden is upon the defendant to bring forward sufficient evidence of self-defense before the trial court can even grant a defense request to give any instruction on self-defense. See,

e.g., Syllabus Point #6, State v. McKinney, 178 W. Va. 200 (1987), and State v. Knotts, 187 W. Va. 785 (1992). That standard of sufficiency was enunciated by this Court in clear terms:

> "Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense."

Based upon the record, the defendant failed to present sufficient persuasive evidence that the defendant was in imminent danger at the hands of Mr. Ayers under either the subjective or objective component of the self-defense test as required by the decision in State v. Kirtley, supra. The sole evidence regarding the events in Mr. Ayers' apartment is Mr. Ayers' testimony and the physical evidence observed by police. The defendant provided only speculation that there was such a danger since neither did the defendant testify nor was the defendant's statement to police introduced into evidence. The courts should not give instructions which require a jury to speculate regarding evidence in a case. Cf., Syllabus Point #1, Oates v. Continental Insurance Co., 137 W. Va. 501 (1952).

The totality of the circumstances in this case show that the defendant was not in imminent fear of receiving a violent injury at the hands of Mr. Ayers. These facts show that the defendant had no fear but was rather quite fearless toward Mr. Ayers.

First, Mr. Ayers was "pretty intoxicated" while the defendant was "a lot less intoxicated." Day Two Tr. at p. 14. Indeed, the taxicab driver, Chris Neeley, stated that Mr. Ayers "struggled" to get out of the taxi because of his level of intoxication. Id.

Second, the defendant knew that Mr. Ayers had money and had just cashed a paycheck. The defendant told the taxicab driver,

> "Well, if this queer wants to spend his paycheck on me, then I'll let him."

Third, the credible evidence offered by Mr. Ayers regarding the events in Mr. Ayers' apartment show the defendant was a guest and was not in imminent fear of receiving a violent injury. Mr. Ayers entered his apartment with the defendant, turned on the television and prepared drinks for himself and the defendant. Mr. Ayers then returned to the couch on which the defendant was seated and placed his right hand on the top of the defendant's left leg. Mr. Ayers saw the defendant's action and withdrew:

> "[The defendant] seemed to get upset, so that's when I started getting nervous and so I was willing to, you know, you know, give him some money so that he could maybe just leave and, you know, like I said, if he needed it for transportation or whatever, he couls use it."

Day One Tr. at p. 103. At that point Mr. Ayers offered the defendant twenty dollars to leave and the defendant refused. Twenty dollars was not enough money.

When a reasonable person looks at the totality of the evidence and the reasonable inferences drawn from the evidence it is obvious

that the defendant was not placed in imminent fear of receiving a violent injury, including a sexual assault. The defendant's conduct is more consistent with an extortion attempt to acquire more money from Mr. Ayers.

Further, the claim of error for not giving a self-defense instruction is diminished by the defendant's violent conduct in striking Mr. Ayers "more than once." Day Two Tr. at 48. Because Mr. Ayers lost consciousness after the defendant hit Mr. Ayers the first time, Day One Tr. at p. 103, the defendant's subsequent vicious attack on an unconscious victim exemplifies the fearlessness of the defendant at a time when the defendant purports to be fearful of imminently receiving a violent assault at the hands of Mr. Ayers.

The defendant did not testify at trial, nor was the defendant's statement used. As a result there is no evidence of the actual state of mind of the defendant at the time of the placing by Mr. Ayers of his hand on the defendant's leg. Such evidence is necessary under these circumstances to sustain a defense of self-defense. Because the evidence is lacking there is no evidence that the defendant was actually in fear of imminently receiving a violent injury which would thereby justify his conduct in Mr. Ayers' apartment on August 31, 2004.

The totality of the evidence confirms the lack of fear on the part of the defendant after Mr. Ayers' placed his hand on the

defendant's leg. The defendant did not leave Mr. Ayers' apartment. The defendant did not say, "Stop." The defendant fearlessly told Mr. Ayers that twenty dollars was not enough to make the defendant leave Mr. Ayers' apartment. Then and only then did the defendant attack and severely injure Mr. Ayers with more than one blow to the left side of his face. Day Two Tr. at p. 49.

In closing, the record in this trial shows that the defendant did not meet the standard in this State for a self-defense instruction. Therefore, the trial court did not abuse its discretion or commit error in refusing the defendant's proposed self-defense instruction.

VII.

RELIEF REQUESTED

Wherefore, the State of West Virginia asks that this Court find that the trial Court did not abuse its discretion or commit any error in refusing the defendant's requested self-defense instruction, deny the defendant's appeal, and affirm the conviction of the defendant.

Respectfully submitted,

THE STATE OF WEST VIRGINIA,
By Counsel.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Brief has been served upon the counsel for the appellant, Dennis R. Bailey, by First Class United States Mail, postage prepaid by me, on this the 21st day of April, 2008, to the following address:

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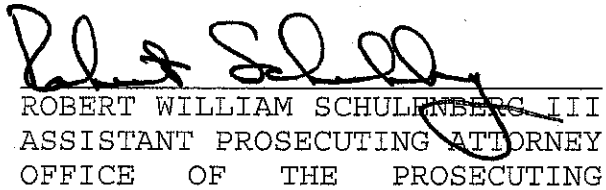
Dated: April 21, 2008.



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